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Supreme Court, U.S.
FILED
081217 DEC 24 2008
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No.

In the

Supreme Court of the United States

CHRISTOPHER F. KEATING,

PETITIONER

v.

JAMES W. ABBOT, in his personal and professional capacities,

and THE UNIVERSITY OF SOUTH DAKOTA

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER F. KEATING, Pro Se
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QUESTIONS PRESENTED

1. Whether the civility clause of appendix G of the collective bargaining agreement between the South Dakota Board of Regents and the faculty as represented by the Committee on Higher Education (the COHE agreement) is constitutional.

2. Whether the civility clause was applied against Petitioner in violation of his constitutional rights to free speech.

3. Whether the South Dakota Supreme Court erred in denying Petitioner's appeal concerning the non-renewal of his tenure-track contract with the University of South Dakota for violating the civility clause.

4. Whether the University of South Dakota retaliated against Petitioner for engaging in protected activity.

5. Other issues surrounding the non-renewal of Petitioner's tenure-track contract.

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In the Supreme Court of the United States

CHRISTOPHER F. KEATING, PETITIONER

v.

JAMES W. ABBOT, in his personal and professional capacities, AND THE UNIVERSITY OF SOUTH DAKOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the South Dakota Supreme Court in this case.

OPINIONS BELOW

South Dakota Supreme Court Order Directing Issuance of Judgment of Affirmance, dated October 8, 2008, is reprinted in the Appendix hereto, pp 1.

South Dakota Supreme Court Order Directing Issuance of Judgment of Affirmance, dated November 10, 2008, is reprinted in the Appendix hereto, pp 2.

The opinion of the South Dakota Circuit Court is reprinted in the Appendix hereto, pp 3 – 17.

The opinion of the South Dakota Department of Labor administrative hearing is reprinted in the Appendix hereto, pp 18 – 24.

JURISDICTION

The judgment of the South Dakota Supreme Court was entered on October 8, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment To The United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The civility clause of Appendix G to the collective bargaining agreement between the South Dakota Board of Regents and the university faculty as represented by the Committee on Higher Education (the COHE agreement)

Civility in working with colleagues, staff members, students and others

Universities play a special role in preparing students to lead the complex social organizations through which businesses and professions operate and through which free people govern themselves. Students must be taught, and they must be shown through the example given by institutional employees, that members of stable, effective and prosperous social organizations observe norms of conduct under which all participants treat one another civilly and carry out their respective tasks in a constructive and informed manner. Complex social organizations derive their strength from the cooperation of those who participate in them. By virtue of their special role in preparing future generations of leaders, universities have a particular concern with conduct that destroys the bonds of cooperation and common purpose on which society rests by demeaning members of the community, and

such conduct cannot be tolerated in an institution whose very purpose is to shape the skills and conscience of the rising generations.

Faculty members are responsible for discharging their instructional, scholarly and service duties civilly, constructively and in an informed manner. They must treat their colleagues, staff, students and visitors with respect, and they must comport themselves at all times, even when expressing disagreement or when engaging in pedagogical exercises, in ways that will preserve and strengthen the willingness to cooperate and to give or to accept instruction, guidance or assistance.

South Dakota Codified Law SDCL 1-1A-1. Unconstitutional state actions void. It is the public policy of the State of South Dakota that every statute, rule, regulation, executive order, and office

policy of the State of South Dakota enacted, promulgated, issued, or established in contradiction to the provisions of the United States Constitution, and so judicially determined by a final judgment rendered by the South Dakota Supreme Court, the federal district court for the State of South Dakota, the United States Court of Appeals for the eighth circuit, or the United States Supreme Court, is void within the jurisdiction of the State of South Dakota.

South Dakota Codified Law SDCL 1-1A-2. Enforcement of unconstitutional policies prohibited. No person may enforce any statute, rule, regulation, executive order, or office policy that is in violation of § 1-1A-1.

South Dakota Codified Law SDCL 1-1A-3. State officers to protect constitutional rights.

Every state officer is directed to utilize the full force and authority of his office to resist the intrusion of such unlawful provisions and to protect the constitutional rights of the State of South Dakota and its individual citizens from the encroachments of such provisions.

South Dakota Codified Law SDCL 3-3-4. Restrictions on removal of veteran from employment--Hearing and review--Burden of proof. No person holding a public position by appointment or employment, and belonging to any of the classes of persons to whom a preference is herein granted, shall be removed from such position or employment unless replaced by another person of a class to whom preference is herein granted except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the

right of such employee or appointee to a review by writ of certiorari. The burden of proving incompetency or misconduct shall rest upon the party alleging the same.

South Dakota Codified Law SDCL 3-3-5. Noncompliance as misdemeanor.

Any person in the public service who shall neglect or refuse to comply with the provisions of this chapter is guilty of a Class 1 misdemeanor.

South Dakota Codified Law SDCL 3-18-3.1, Unfair practices of employers defined

(1) Interfere with, restrain, or coerce employees in the exercise of rights guaranteed by law;

(2) Dominate, interfere, or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting

employees to confer with him during working hours without loss of time or pay;

(3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition, or given any information or testimony under this chapter;

(5) Refuse to negotiate collectively in good faith with a formal representative; and

(6) Fail or refuse to comply with any provision of this chapter.

STATEMENT

A. Facts Giving Rise To This Case

Petitioner was a tenure-track professor at the University of South Dakota (USD) from August 1999 to May 2004.

Petitioner was informed in June 2004 that he was being considered for non-renewal of his tenure-track contract under the terms of the collective bargaining agreement between the South Dakota Board or Regents and the university faculty as represented by the Committee on Higher Education (the COHE agreement). Petitioner was informed the charge against him was that he violated the 'civility clause' of appendix G of the COHE agreement. Specifically, he made a comment concerning his supervisor in a private email that he sent from his private residence on a Saturday morning during his off hours.

Petitioner met with members of the administration and was informed of the charge and

given an opportunity to defend himself against the one charge. No other charge was made and petitioner was not allowed to defend himself against any other charge.

Petitioner was never, at any time, accused of being disruptive in the workplace, no evidence was every produced showing he was disruptive in the workplace, and he was never provided any opportunity to defend himself against any such charges.

The university administration personnel have steadfastly insisted this was not a disciplinary action.

Petitioner's tenure-track contract was non-renewed and he was given a one-year term contract that expired in May 2005.

B. Legal Proceedings

Petitioner pursued five grievances under provisions of the COHE agreement and two unfair labor practice complaints through the South Dakota Department of Labor under provisions of SDCL 3-18-3.1, Unfair practices of employers defined.

Petitioner's first grievance claimed the university's action was actually a disciplinary action and Petitioner was denied his due process rights the 14th amendment and provisions of the COHE agreement. Petitioner's second grievance claimed the non-renewal of his contract with USD was in retaliation because he engaged in protected activity by filing a grievance in September 2003 against his supervisor for creating a hostile work environment. Petitioner's third grievance was that his years of service were improperly calculated and, as a result, USD failed to provide him with the proper compensation provided for by the COHE agreement

for late notice of his non-renewal. Petitioner's fourth grievance was that the COHE agreement is not fairly and equitably applied. Petitioner's fifth grievance claimed he was discriminated against due to his military status and denied protection as provided by law.

Petitioner's grievances were found in Petitioner's favor by the faculty review board, but the administration found against Petitioner on all grievances. Petitioner appealed his grievances to the South Dakota Board of Regents, where they were again denied, and then to the South Dakota Department of Labor.

Petitioner's first unfair labor practice complaint filed with the South Dakota Department of Labor claimed that the civility clause was unconstitutional under the 1st amendment of the U.S. Constitution and other statutes, and the way it

was applied against Petitioner was unconstitutional. Petitioner's second unfair labor practice complaint was the same as the same as his second grievance listed above and claimed his non-renewal as a retaliatory action taken because Petitioner had engaged in a protected activity.

An administrative hearing administered by a South Dakota Department of Labor administrative law judge was held on the campus of USD in January 2006 to hear Petitioner's grievances and unfair labor complaints. The South Dakota administrative law judge issued his opinion in October 2006 and denied all of Petitioner's grievances and unfair labor complaints.

Petitioner appealed the decision to the South Dakota Circuit Court and a hearing was held in July 2007. The circuit court issued its decision in December 2007. The court found in Petitioner's favor

on his third grievance concerning his years of service, but denied him the payment due under terms of the COHE agreement. The circuit court found against Petitioner on all other points except Petitioner's claim concerning the constitutionality of the civility clause. The circuit court did not address this issue in its decision.

Petitioner appealed the decision to the South Dakota Supreme Court, which dismissed Petitioner's appeal on October 8, 2008 with the statement that it was without merit and issued no opinion on Petitioner's appeal.

REASONS FOR GRANTING THE PETITION

The issue of government restraint on speech has been previously addressed by this court and other federal courts and the courts have consistently found that all such speech codes are

unconstitutional. Specifically, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court said that the government cannot decide which speech it will allow and which speech it will not allow.

Further, in *Texas v. Johnson* 491 U.S. 397 (1989), the Supreme Court stated, "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because it finds it offensive or disagreeable." Further, the court stated, ""Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, ... a government cannot mandate by fiat a feeling of unity in its citizens."

Other pertinent cases where the courts have struck down free speech limits by the government include: *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Pickering v. Board of Education*, 391 U.S. 563, 568,

88 S. Ct. 1731, 1734-5, 20 L. Ed. 2d 811 (1968); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Keyishian v. Board of Regents*, 345 F.2d 236, 239; and *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562.

Speech codes have also consistently been found to be vague and overbroad. Specific cases supporting this determination include: *Gooding v. Wilson*, 405 U.S. 518 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); and *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972)

At least six such university speech codes have been declared unconstitutional by the courts in recent years: *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989), *Corry v. Stanford* (No. 740309, California Superior Court, Santa Clara County, 1995); *Cohen v. San Bernardino Valley*

College, 92 F.3d 968 (9th Cir. 1996), *UWM Post v. Board of Regents of University of Wisconsin*, 774 F. Supp. 1163 (E.D., Wis. 1991), *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993), and *DeJohn v. Temple University*, Case No: 07-2220 (2008), Third Circuit Court of Appeals.

By prohibiting any speech considered to be uncivil, without any definition of what constitutes 'uncivil', the civility clause is punishing and banning a broad range of speech, including that which is protected by the U.S. Constitution and other statutes. As a matter of law, the civility clause is overbroad. Without any definition or measure of 'uncivility', the civility clause is also vague, allowing the measure to be applied in an arbitrary manner.

Additionally, there is no due process available to anyone accused of violating the civility clause, in violation of the protections of the 14th amendment.

Since there is no definition of what constitutes 'uncivility', the accusation cannot be challenged. With the exception of one grievance step that is adjudicated by the faculty, the grievance process is adjudicated by the administration, the same individuals that pursue the action against the faculty members and whom grievances are filed against. The findings of the faculty review board are disregarded and are termed 'irrelevant' by the administration. The administrative law judges in the South Dakota Department of Labor sit as judges in hearings against state interests, but also act as advocates representing the state in other hearings. With the judge acting as both judge and advocate for the state, it is not reasonable that any faculty member can expect a fair and unbiased hearing against a state entity.

This court has also addressed the issue of retaliation in the workplace. Notably, *Ray v. Henderson*, 217 F.3d 1234, 1243-44 (9th Cir.2000); *Heath v. General Services Admin.* (1998 EEOPUB LEXIS 4562 (1998)); *Harrison v. Metropolitan Government of Nashville*, 80 F.3d 1107 (6th Cir. 1996); *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S., 126 S.Ct. 2405 (2006); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Chamberlain v. Bissell, Inc.*, 547 F.Supp. 1067 (W.D. Mich.1982); and *Reeves v. Sanderson Plumbing Products, Inc.* (99-536) 530 U.S. 133 (2000) 197 F.3d 688, reversed.

Most of the cases cited above are final judgments of the U.S. Supreme Court.

As a veteran, Petitioner was entitled to protection in his employment by SDCL 3-3-4. None of the actions required in this statute were fulfilled by

the university and Petitioner was denied this protection under the law. SDCL 3-3-5 states that violation of this law is a misdemeanor. The courts refused to enforce this law.

South Dakota Codified Law SDCL 1-1A-1 voids any action that is in violation of judgments of U.S. Supreme Court, while SDCL 1-1A-2 prohibits the enforcement of anything that is in violation of SDCL 1-1A-1 and SCDL 1-1A-3 requires all South Dakota officers to protect the constitutional rights of the individual citizens. By failing to uphold the findings of the U.S Supreme Court, USD, James W. Abbott, the South Dakota Board of Regents, the South Dakota Department of Labor, the South Dakota Circuit Court and the South Dakota Supreme Court all failed to uphold these three state laws. By failing to enforce the final judgments of the U.S. Supreme Court, these officers of the State of South

Dakota have violated Petitioner's 14th amendment rights.

CONCLUSION

With its decision, the South Dakota Supreme Court decided important federal questions in a way that conflicts with the decisions of United States courts of appeal and the U.S. Supreme Court. It has also decided important federal questions in a way that conflicts with relevant decisions of this Court. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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**IN THE SUPREME COURT OF
THE STATE OF SOUTH DAKOTA
CASE NO: #24879**

DR. CHRISTOPHER F. KEATING,
Appellant,

vs. (Filed Nov 10, 2008)

JAMES W. ABBOTT and THE
UNIVERSITY OF SOUTH DAKOTA,
Appellees.

**ORDER DIRECTING ISSUANCE
OF JUDGMENT OF AFFIRMANCE**

The Court considered all of the briefs filed in the above-entitled matter, together with the appeal record, and concluded pursuant to SDCL 15-26A-87.1(A), that it is manifest on the face of the briefs and the record that the appeal is without merit on the following grounds: 1. that the issues on appeal are clearly controlled by settled South Dakota law or federal law binding upon the states, 2. that the issues on appeal are factual and there clearly is sufficient evidence to support the findings of fact and conclusions of law, and 3. that the issues on appeal are ones of judicial discretion and there clearly was not an abuse of discretion (SDCL 15-26A-87.1(A) (1), (2) and (3)), now, therefore, it is

ORDERED that a judgment affirming the Orders of the circuit court be entered forthwith.

Dated at Pierre, South Dakota, this 10th day of November, 2008.

BY THE COURT:

David Gilbertson, Chief Justice

(Justice Richard W. Sabers deeming himself disqualified did not participate.)

PARTICIPATING: Chief Justice David Gilbertson, Justices John K. Konenkamp, Steven L. Zintner and Judith K Mierhenry.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
CASE NO.: #24793

DR. CHRISTOPHER F. KEATING,
Appellant,

vs. (Filed Oct 8, 2008)

JAMES W. ABBOTT and THE
UNIVERSITY OF SOUTH DAKOTA,
Appellees.

ORDER DIRECTING ISSUANCE
OF JUDGMENT OF AFFIRMANCE

The Court considered all of the briefs filed in the above-entitled matter, together with the appeal record, and concluded pursuant to SDCL 15-26A-87.1(A), that it is manifest on the face of the briefs and the record that the appeal is without merit on the ground that the issues on appeal are clearly controlled by settled South Dakota law or federal law binding upon the states (SDCL 15-26A-87.1(A) (1)), now, therefore, it is

ORDERED that a judgment affirming the Orders and Judgment of the circuit court be entered forthwith.

Dated at Pierre, South Dakota, this 8th day of October, 2008.

BY THE COURT:
David Gilbertson, Chief Justice

(Justice Richard W. Sabers deeming himself disqualified did not participate.)

PARTICIPATING: Chief Justice David Gilbertson, Justices John K. Konenkamp, Steven L. Zintner and Judith K Mierhenry.

IN CIRCUIT COURT
COUNTY OF CLAY
STATE OF SOUTH DAKOTA
FIRST JUDICIAL CIRCUIT
CASE NO.: CIV 06-307

DR. CHRISTOPHER F. KEATING,
Appellant,

vs. (Filed Jan 02, 2008)

JAMES W. ABBOTT and THE
UNIVERSITY OF SOUTH DAKOTA,
Appellees.

ORDER AND JUDGMENT

The above-entitled matter having been considered by the Court on the administrative record; and the Court having fully considered the matter and having issued it Memorandum Opinion on November 30, 2007; having thereafter made and entered its Findings of Fact and Conclusions of Law bearing even date herewith; and it having been determined by the Court that the decision of the South Dakota Department of Labor, Division of Labor and Management, Randy S. Bingner, Administrative Law Judge, ought to be affirmed, except to the extent that the same is modified by the Court's Findings of Fact and Conclusion of Law; it is hereby

ORDERED, ADJUDGED AND DECREED that the appeal of the above-entitled matter is dismissed and the decision of the administrative agency is affirmed in all respects except as modified by this Court; it is further

ORDERED that Appellee shall be entitled to their costs and disbursements herein in the sum of $_____, to be hereafter inserted by the Clerk.

Dated this 2nd day of January, 2007

BY THE COURT

Steven R. Jensen, Judge
Circuit Court

IN CIRCUIT COURT
COUNTY OF CLAY
STATE OF SOUTH DAKOTA
FIRST JUDICIAL CIRCUIT
CASE NO.: CIV 06-307

DR. CHRISTOPHER F. KEATING,
Appellant,

vs. (Filed Jan 02, 2008)

JAMES W. ABBOTT and THE
UNIVERSITY OF SOUTH DAKOTA,
Appellees.

ORDER DENYING APPLICATION TO PRESENT ADDITIONAL EVIDENCE

Appellant, Dr. Christopher F. Keating, having made Application to Present Additional Evidence, and the Court having issued its Memorandum Opinion on November 30, 2007, holding that Appellant has failed to make any showing as required by SDCL 1-26-34, it is hereby

ORDERED that the Application to Present Additional Evidence is denied.

Dated this 2nd day of January, 2008

BY THE COURT:
Steven R. Jensen, Judge
Circuit Court

IN CIRCUIT COURT
COUNTY OF CLAY
STATE OF SOUTH DAKOTA
FIRST JUDICIAL CIRCUIT
CASE NO.: CIV 06-307

DR. CHRISTOPHER F. KEATING,
Appellant,

vs. (Filed Jan 02, 2008)

JAMES W. ABBOTT and THE
UNIVERSITY OF SOUTH DAKOTA,
Appellees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come before the Court on appeal from an administrative decision by the Department of Labor and Management; and the Court having reviewed several hundred pages of documents which constitute the entire record, the Appellant having failed to order a transcript of the administrative proceedings; and the Court having reviewed the entire administrative record; and having heretofore on November 30, 2007, issued its Memorandum Opinion setting forth the Court's decision, which Memorandum Opinion is on file in this matter and which is incorporated herein as if fully set forth; and the Court hereby makes the following:

Findings of Fact

1. The Court adopts the Findings of Fact of the administrative agency except to the extent that the

same are modified in the Court's Memorandum Opinion hereinabove referred to, and a copy of such Findings of Fact are attached hereto and by this reference made a part hereof.

Conclusions of Law

1. The Court hereby adopts the Conclusions of Law of the administrative law judge except to the extent that the same are modified in the Court's foregoing Memorandum Opinion.

Let judgment be entered accordingly,
Dated this 2nd day of January, 2008

BY THE COURT:
Steven R. Jensen, Judge
Circuit Court

IN CIRCUIT COURT
COUNTY OF CLAY
STATE OF SOUTH DAKOTA
FIRST JUDICIAL CIRCUIT

November 30, 2007
(Received Jan 02, 2008)

Christopher Keating
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Robert B. Frieberg
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Re: Keating v. James W. Abbott et. al. Civ. 06-307

Dear Mr. Keating and Mr. Freiberg:

This matter came before the court on appeal from an administrative decision by the Department of Labor and Management ("DOL") denying several grievances and unfair labor practices filed by Christopher Keating ("Keating") arising from his employment at the University of South Dakota. Both parties submitted writeen and oral argument in support of their respective positions. The administrative record consists of hundreds of pages of documents, which the court has now had an opportunity to review; however, there is no transcript of the proceedings and testimony before the DOL. Keating has also made an application to present additional testimony in support of his claims, which

the Appellees, James Abbott and the University of South Dakota (hereinafter jointly referred to as "USD") resist.

Failure to Order a Transcript of the Administrative Proceedings

SDCL 1-26-32.2 requires the appellant to order a transcript, or such part of the administrative proceedings he deems necessary for the appeal within ten days after filing the appeal. Keating failed to order any part of the administrative transcript. The court understands that there was a two day hearing before the DOL with testimony from several witnesses, along with one or more prehearing conferences. Keating asserts that the DOL made numerous errors arising from the proceedings from which there are no record. Keating's failure to timely order the transcript under the statute constitutes a waiver of the right to order the transcript and makes the review of several issues presented difficult.

SDCL 1-26-32.2 sets out a timeframe frame for each party to order any portion the transcript. However, the obligation the appellee to order a transcript is only triggered if appellee deems other portions of the transcript are necessary based upon the statement of issues filed or based upon portions of the transcript ordered by appellant. USD has not requested this court to review any issues that were before the DOL.

The rules for ordering a transcript in an administrative appeal are similar to the rules for appeals to the Supreme Court in SDCL 15-26A-48, 15-26A-49, and 15-26A-50. Under its appellate rules

the Supreme Court has held that appellant bears the primary responsibility to present a complete record to the reviewing court. In Baltodano v. North Central Health Services, Inc., 508 NW2d 892, 894 (SD 1993), the Court stated:

> "We have stated that "the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant." Pearson v. Adams, 279 N.W.2d 674, 676 (S.D.1979). "Failure to timely order a transcript constitutes a waiver of the right to a transcript." SDCL 15-26A-49; Reed v. Heath, 383 N.W.2d 873, 874 (S.D.1986). Where an appellant waives the right to a transcript by failing to order it, the only review which can take place 'is a review of that portion of the record which was before the circuit court.' Hawkins v. Peterson, 474 N.W.2d 90, 92-93 (S.D.1991). Where the record contains no transcript, the record on appeal is confined to those pleadings and papers transmitted from the circuit court. Reed, 383 N.W.2d at 874 (citing Pearson, 279 N.W.2d at 676; Caneva v. Miners & Merchants Bank, 335 N.W.2d 339, 342 (S.D1983))."

The court will review this appeal based upon the record submitted for the DOL.

Application to Present Additional Evidence

Keating's Application to Present Additional Evidence asserts that he should be permitted to subpoena additional documents not received prior to the administrative hearing. He seeks production of a

number of documents that he claims support his issues on appeal. The documents sought consist of emails between various USD employees. In addition, Keating also seeks the notes of Roberta Hakl, a USD employee, who was involved in the investigation of Keating's claims harassment and retaliation by USD.

The record shows that Keating subpoenaed several witnesses, including Hakl on more than one occasion. It is unclear whether the subpoenas were honored, or if an issue was ever addressed by the DOL concerning compliance. Subsequently, Keating served Requests of Production of documents upon USD. The requests included email from USD employee and documents in Hakl's possession. USD responded by stating that ll the requested documents would be made available for inspection and copying, except for Keating's request to inspect documents showing attorney's fees paid by USD to its attorney. Keating moved to compel production of the attorney's fees, which the DOL denied prior to hearing. Keating does not challenge this ruling.

There is no showing that Keating ever moved o compel the attendance of any witnesses or the production of any documents before the DOL. Further, there is no showing that Keating asserted to the DOL that USD failed to make any of the requested documents available, or that documents were missing. Keting makes several references to discussions during the proceedings before the DOL involving documents or witnesses at issue. The transcript was not ordered and the court is unable to locate documents in the record which support Keating's claims.

SDCL 1-26-34 provides that he circuit court may order additional evidence to e presented to the agency from which an appeal is made upon a showing that the additional evidence is material and that there were good reasons for the failure to present the evidence in the proceedings before the agency. Initially, the court is unable to determine from the record how any of evidence would be material or whether it is cumulative to the evidence presented at the DOL hearing. Moreover, Keating has failed to show that there are good reasons for the failure to either discover or present this evidence before the DOL. For these reasons, the Application to present additional evidence is denied.

Standard of Review

The court reviews the administrative decision as set forth in SDCL 1-26-36. The court accords great weight to the findings and inferences made by the hearing examiner on factual questions. Clarkson & Co. v. Harding County, 1998 SD 74, ¶5, 581 NW2d 499, 501. When the issue is a question of fact, the Court reviews the administrative agency's findings under a clearly erroneous standard. Petersen v. Hinky Dinky, 515 NW2d 226, 231 (SD 1994). Questions of law are fully reviewable de novo and no deference is to be given to the administrative agency's conclusions. Thomas v. Custer State Hospital, 511 NW2d 576 (SD 1994); Petersen v. Hinky Dinky, 515 NW2d 226 (SD 1994); Johnson v. Skelly Oil Co, 359 NW2d 130 (SD 1984). It is within the province of the court to interpret statutes without assistance from the agency. Permann, supra.

Issues on Appeal

Keating filed five grievances against USD arising from the non-renewal of his tenure track contract with USD. Each grievance was filed pursuant to the Counsel of Higher Education Agreement (COHE)[1], which is the collective bargaining agreement governing Keating's employment with USD. Each grievance was denied in the final stage of the grievance process before the South Dakota Board of Regents. The DOL also denied each of the grievances on appeal to the agency. Keating claims that the DOL erred in this determination and also asserts that the DOL erred in denying his two unfair labor practices claims against USD. Finally, Keating also asserts that the DOL's decision was made upon unlawful procedure because the administrative law judge engaged in "judicial bias" toward him. This claim was not raised by Keating before the DOL.

[1]The COHE agreement in force as the time of the nonrenewal was for the period of 2002 to 2005. Although a new COHE agreement in currently in effect, the court refers to the COHE agreement in a present tense because the provisions at issue are unchanged in the subsequent agreement.

Keating was employed as a tenure track Associate Professor of physics at USD beginning in the 1999-2000 academic year. Before each academic

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[1] The COHE agreement in force as the time of the nonrenewal was for the period of 2002 to 2005. Although a new COHE agreement in currently in effect, the court refers to the COHE agreement in a present tense because the provisions at issue are unchanged in the subsequent agreement.

year, Keating signed a one year written contract with USD providing that this employment would terminate at the end of each academic year, subject to the right to renew the contract at the sole discretion of USD. Keating signed a one year contract each year through the 2003-2004 academic year.

On June 9, 2004, Keating was given notice in writing by the Director of Physics and by the Vice President of Academic Affairs that USD was considering not renewing his tenure track contract for lack of adherence to the standards of civility required by his contract. On June 29, 2004, President James Abbott notified Keating of his decision not to recommend renewal of his tenure tract contract for the 2004-2005 academic year. President Abbott state that the decision was based upon Keating's failure to adhere to the standards of civility required by his contract. President Abbott extended Keating an offer of a one year term contract for the following academic year. Keating accepted this offer and taught for another year under the one year term contract.

Grievance 1: That the non-renewal of his tenure track contract with USD was disciplinary action and USD failed to follow Sections 8.6 and 15 of the COHE agreement in taking this action.

Keating argues that because USD cited a reason for the non-renewal of his tenure track agreement that the action was disciplinary in nature and required USD to follow Section 15 of the COHE Agreement addressing "discipline" and "just cause" termination of an employee. Keating argues that

Section 8.6 relied upon by USD for non-renewal of his contract was not proper because USD terminated his contract for cause.

The DOL found and Keating does not dispute he was employed by USD under the terms of a nine month tenure track contract as a physics professor for the 2003/2004 academic year. The DOL also found that Keating's contract with USD was not renewed based upon the June 29, 2004 decision of President Abbott. These facts are supported by the record before the court.

The court has reviewed the DOL's written decision and legal conclusions based upon these facts. The DOL decision properly reads the provisions of the COHE contract relating to non-renewal of a tenure track contract. The CHOE agreement is clear that "None-renewal is not a disciplinary action." Further the COHE agreement specifically state that the "notice will state the reasons for the decision" not to renew. The uncontested facts and plain terms of the COHE agreement show that the action taken by USD was a non-renewal of Keating's contract. Keating does not cite any authority, nor is there any language in the COHE Agreement supporting his claims. The court adopts and affirms the findings of fact and conclusions of law entered by the DOL on this issue.

Grievance 2: That the non-renewal of Keating's contract with USD was in retaliation for his participation in a grievance claim made against his supervisor, Christina Keller ("Keller") in the fall of 2003;

Keating claims that the DOL erred in determining that the non-renewal of his contract was not in retaliation for the grievance which he filed against Keller. The written documents in the record show that Keating filed his grievance against his supervisor in September 2003 alleging harassment and retaliation. On May 6, 2004 Hakl found no violations by Keller. The non-renewal of Keating's contract was initiated in June of 2004. Citing Leslie v. Hy-Vee Foods, Inc., 2004 SD 59, ¶11, 679 NW2d 785 the DOL determined that the filing of the grievance against his supervisor was a protected activity and that Keating suffered an adverse employment action subsequent to his filing the grievance. However, the DOL found that Keating failed to show a causal connection between the protected activity and the adverse employment action, a necessary third element to establish a prima facie case of retaliation. Despite the determination that Keating failed to show a prima facie case of retaliation, the DOL went on to find that USD had a legitimate non-discriminatory reason for the non-renewal.

Leslie does not discuss the quantum of proof necessary for a claimant to initially establish a prima facie case of discrimination or retaliation. The Eighth Circuit, which uses the same burden shifting analysis as Leslie for a claim of retaliation has discussed the quantum of proof for a prima facie case on a number of occasions. In Stewart v. Independent School District No. 196, 481 F3d 1034, 1043 (8th Cir. 2007), the court stated:

> We have described the actual evidentiary burden that a plaintiff must meet at the prima facie stage as "minimal." Logan, 416 F.3d at 881. Where the evidence is not strong, that evidence, standing alone, may be insufficient to sustain the plaintiff's case at the final stage of the burden-shifting analysis. See id at 881...
>
> Taken together, these cases demonstrate that the burden-shifting framework is merely an analytical construct; the ultimate burden of proving retaliation remains at all times with the plaintiff; and the level of proof required to show causation is less at the prima facie stage than at the final stage of the McDonnell Douglas analysis. As such, if an employer has articulated a legitimate reason for its actions, it is permissible for courts to presume the existence of a prima facie case and move directly to the issue of pretext and the determination issue of causation when bypassing the prima facie case analysis leads to clarity in framing the issues under review.

The DOL found "Keating did not produce any evidence or a single witness in support of his version of the facts." The DOL also found Keating's testimony was not credible. The DOL also made findings concerning USD's stated reason for non-renewal:

> "the evidence does provide the support for USD's decision. The evidence proves that Keating did not adhere to the civility

> standards set forth in Appendix G to the COHE Agreement. All of Keating's own witnesses affirmed the facts that he was uncivil, uncooperative, unreasonable in his demands, and disruptive during his employment. Further, these witnesses established that he was unwilling to accept any suggestions from others to improve his behavior."

Keating has failed to submit anything to show these findings are in error and the written documentation in the record supports the DOL's findings. The findings are not clearly erroneous. Even applying the presumption that a prima facie case of retaliation existed, Keataing has failed to meet his ultimate burden to show retaliation on this record as USD had a legitimate non-discriminatory reason for the non-renewal. The court adopts and affirms the findings of fact and conclusions of law by the DOL, except that the court clarifies its conclusion that even under a presumption that a prima facie case of retaliation occurred, Keating has failed to meet his burden of show retaliation because USD had a legitimate nondiscriminatory reason for the non-renewal.

> **Grievance 3: That Keating's years of service were improperly calculated and as a result USD failed to follow the proper procedure for the non-renewal of his contract, and that if the years of service were properly calculated, USD had no authority to non-renew Keating contract under COHE.**

Keating alleges that that he had less than four years of service at the time his contract was not renewed and was entitled by notice of his non-renewal by December 15 under Section 8.6(2). The DOL determined that Keating had more than four years of service and was entitled to notice by April 1 under Section 8.6(3), which although untimely, Keating was not entitled to any additional remedy for the late notice. There is no dispute that USD's notice of non-renewal of Keating's contract was late because the Keating was not given notice until June of 2004.

Despite the belated notice, the DOL determined that Keating was given a one year term contract following the notice of non-renewal consistent with Section 8.6(3) and because the COHE agreement did not provide any other remedy or penalty for late notice under Section 8.6(3), the late notice did prejudice Keating. Keating argues that because of two leaves of absence of military service during his time at USD he had less than four years of service and that he was prejudiced by the late nonrenwal notice.

The first question is whether Keating was entitled to notice of nonrenewal under Section 8.6(2) (2-4 years of service) or under Section 8.6(3) (more than four years of service). The DOL determined that Keating received five tenure track contracts before he was non-renewed in June 2004 and thus had more than four years of completed service at the time of nonrenewal. The DOL found that Keating had two separate military leaves while under contract with USD. The DOL found the first leave to be eight months and days during 2001/2002 and the second

leave to be two months and one day in 2003. This totals to more than one academic year and would leave Keating with 3.86 years of service as of completing his fifth year in 2003/2004 as noted by the DOL.

Keating does not dispute the DOL's findings. The issue is whether the DOL properly applied these facts to the express terms of the COHE agreement. Section 21.4 provides that faculty members are eligible to request unpaid leave for required military service. The second paragraph of Section 13.2 provides that "[t]enure track service credit is not earned during a period of leave of absence..." This paragraph further states, "Full-time assignment to off campus duties in the service of private industry or government is treated as a leave of absence..." The subsections under Section 8.6 discussing timely notice of nonrenewal calculates the number of years based upon the "years of service under a tenure track contract". The COHE agreement is clear that number of years is not based upon the number of contracts signed, but rather based upon the actual time of service under the contracts. Deducting the two leaves of absence taken by Keating as required by the COHE agreement shows that Keating had less than 4 years of service as of the time he completed his fifth contract year. The DOL erred in determining that Keating had more than four years service based upon the clear terms of the COHE agreement.

Having determined that Keating had less than four years of service as defined by COHE, he was entitled to the notice under Section 8.6(2) requiring notice by December 15. The notice was not given to Keating until at least June 9. Section 8.6(4) provides

the remedy for a late nonrenewal of an employee with less than four years of service as either a (1) payment for twice the number of working days the notice is late, or (2) a contract for such length of time. The notice to Keating was late by half of the academic year. Keating was offered and received a subsequent term contract for an entire academic year. Although the language of Section 8.6(4) bases the length of the contract upon the number of "working day' the notice was late, Keating has failed to show that the one year term contract he was offered was less than twice the number of working days the notice was late. Keaating has failed to meet his burden toi show that USD's violation of the procedural requirements of the COHE agreement resulted in any prejudice to him. See, Beville v. University of South Dakota, 420 NW2d 9, 14 (SD 1988).

Because Keating had less than four years of service, it is unnecessary to determine whether USD was required to offer Keating another tenure track employment contract for 2004/2005 b ecause of the untimely notice under Section 8.6(4) (more than four years of service). The court affirms the decision of the DOL under this section, but modifies the conclusions of law for the reasons set forth herein.

Grievance 4: That USD failed to fairly and adequately apply the COHE agreement, and I doing so should commence disciplinary actions against Keller.

The written decision of the DOL states that Keating's claim "that the COHE Agreement had been

inequitably applied was denied for lack of evidence of any inequitable application of ny terms of the COHE Agreement." This decision is incorporated into the Findings of Fact and Conclusions of Law. It appears that the determination of this issue occurred during the hearing before the DOL for which the court does not have a transcript.

Keating fails to allege any specific error by the DOL in its determination of "lack of evidence of any inequitable application of the any terms of the COHE Agreement." The court does not find any error based upon its review of the record. The court affirm's the DOL's decision on this issue and adopts the DOL's Findings of Fact and Conclusions of Law on this issue.

Grievance 5: That Keating was discriminated against by USD because of his veteran status.

The written decision of the DOL states as to this grievance that "[d]uring the hearing before the Department, Keating's allegation that he had been denied veteran's preference was denied as untimely." Keating does not assert any specific error as to the DOL's determination on this issue, nor has he presented any part of the record showing that this determination was in error.

The court also notes the DOL's decision on the claim of retaliation by Keating in which the DOL found that USD had a legitimate non-discriminatory reason for Keating's non-renewal. There is no finding, nor is there any evidence in the record before this court that Keating's veteran status had anything

to do with his non-renewal. The court affirms the DOL on this issue and adopts the DOL's Findings of Fact and Conclusions of Law on this issue.

Unfair Labor Practice #1: That USD committed an unfair labor practice and violated his Constitutional Right of Free Speech under the First Amendment by invoking the "civility clause" of the COHE Agreement against Keating.

Keating asserts that USD committed an unfair labor practice under SDCL 3-18-3.1(1) by denying his free speech rights guaranteed by the First Amendment to the Constitution. If true, such a claim is the proper basis for an unfair labor practice under the statute, which prohibits a public employer from interfering with, restraining, or coercing "employees in the exercise of rights guaranteed by law." It is unclear from the record what "protected" statements Keating claims led to his non-renewal. The only specific statement Keating asserts in his brief and at oral argument was his email to the chairman of the department, Timothy Heaton, calling Keller a "lieing (sic) backstabbing sneak".

In Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) the United States Supreme Court recognizes that a state cannot condition public employment on a basis that infringes upon an employee's constitutional free speech rights. Pick3ering and the cases following w:st="on"Pickering have developed a four step analysis to determine whether an employee's right to free speech is violated.

Initially, the trial court must determine the threshold issue of whether the employee's speech is a matter of public concern. Rankin v. McPherson, 483 U.S. 378, 146 (1987); Connick v. Myers, 461 U.S. 138, 146 (1983). This involves an examination of the content, form, and context of the speech. Ranking, 483 U.S. At 384-85. The court must then weigh the interests of the public employee against the interest of the public employer, again considering the context and circumstances of the speech. Ranking, 483 U.S. At 388. Both of these steps are questions of law for the trial court. Burnham v. U.S. At 388. Both of these steps are questions of law for the trial court. Burn v. Ianni, 119 F.3d 668, 679 (8th Cir. 1997); Kincade v. City of Blue Springs, 64 F.3d 389, 395 (8th Cir. 1995). Only after the court determines the first two issues does the fact-finder make a determination in the third step of whether the protected speech played a substantial role in the employment decision. Mt. Healthy City School Bd v. Doyle, 429 U.S. 274, 287 (1977). If so, the employer has the burden in the fourth step to prove that I would have reached the same decision in the absence of the protected speech. Id. At 287.

The email message containing the remark about Keller does not reflect any matter of public concern. Rather, the email only involves a discussion of employee relationship issues between Keating and others in the Department. As the Court in Connick, 461 U.S. At 147 stated such communications are not made "as a citizen upon matters of public concern, but instead as an employee upon matters of only a personal interest."

The DOL determined that "Keating's criticism of his supervisors did not rise to the level of speech protected by the First Amendment". This court does not find any error in this determination. Keating has failed to present any testimony from the DOL hearing to show that any statements he made involved a matter of public concern. Further, Keating specifically acknowledged to this court at the time of the oral arguments that the email containing the derogatory comment about Keller was a private communication made from his home to the department chair. He argued that he did intend the email to be a public communication.

Because Keating failed to meet the first prong of Pickering his free speech claim must fail and there was no violation of SDCL 3-18-3.1(1). The court affirms the decision of the DOL on this issue for the reasons stated herein.

Unfair Labor Practice 2: That USD committed an unfair labor practice b dismissing him in retaliation for filing a grievance against Keller.

Keating's claim of an unfair labor practice for retaliation is the identical issue he raises in his second grievance. For the reasons set forth therein the court affirms the denial of the claim for retaliation and adopts the DOL's findings and conclusions, except as modified in the discussion above in Grievance 2.

Whether the Department enganed in "judicial bias" or other unlawful

procedure in determining Keating's appeal.

Keating asserts that the administrative law judge was biased toward him in handling of the hearing and in the decision rendered. Keating makes several complaints about the administrative law judge's bias toward him during the hearing. The court does not have the transcript of the hearing supporting such claims and there is no showing that any such claims were asserted by Keating at the time of the administrative hearing.

In Gilkyson v. Wheelchair Express, 579 NW2d 1 (SD 1998) the Court held that party waives a claim of judicial misconduct by failing to raise the issue at he time of trial. Gilkyson Court stated the rationale for this rule as follows:

The affidavits containing Wheelchair Express' version of the objectionable facts were filed well after the completion o the trial, thus denying the plaintiff the chance to be timely heard on the matter. In addition, it denied the trial court the opportunity to consider an objection and take whatever measures it felt were necessary, if any, to correct the situation. Id. At 4.

The court does not find any basis for a claim of judicial bias or misconduct by the administrative law judge during the hearing, but such claims were waived by failing to assert such a claim at the time of hearing.

Keating also argues judicial bias or misconduct in the written ruling from the

Department. It appears that the bulk of Keating's complains about the administrative law judge simply reflect his disagreement with the ruling by the Department. This does not create a basis for asserting a claim of judicial bias or misconduct. The Court in State v. Page, 709 NW2d 739, 750 (SD 2006) stated, "As we have consistently stated, this Court presumes a judge was impartial absent a specific and substantial showing to the contrary." The Page Court further cited Canon 3E(1)(a) of the Code of Judicial Conduct occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

Keating disagreement or disappointment with the DOL's decision does not create a basis to assert judicial bias. The written decision, findings and conclusions of the Department do not demonstrate any judicial bias by the DOL toward Keating. The decision is well supported by the record before this court. The court finds absolutely no basis in this record to support Keating's claims of judicial bias or misconduct.

For all the reasons set forth herein the court affirms the decision of the Department. The court requests Mr. Frieberg to prepare findings of fact, conclusions of law and a judgment consistent with this ruling.

Sincerely yours,
Steven R. Jensen
Circuit Court Judge

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
CASE NO.: HF No. 1 U, 2004/05
AND HF No. 11 G, 2004/05

DR. CHRISTOPHER F. KEATING,
Petitioner,

vs. (Received Oct 23, 2006)

JAMES W. ABBOTT and THE
UNIVERSITY OF SOUTH DAKOTA,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having been heard before the South Dakota Department of Labor, Randy S. Bingner, Administrative Law Judge, at Vermillion, Clay County, South Dakota, on January 17 and 18, 2006; the Grievant and Petitioner appearing pro se, and the Respondents represented by Robert B. Frieberg of Frieberg, Nelson & Ask, LLP; and the Judge having considered the evidence and the arguments of the parties and being fully advised in the premises; and a Decision having been issued on October 13, 2006, which Decision is on file in this matter, and which is incorporated herein as if fully set forth; the Department hereby makes the following:

FINDINGS OF FACT

1. Dr. Christopher F. Keating, Greivant and Petitioner, (hereinafter Keating), was first

employed by the University of South Dakota, (hereinafter USD), as an Associate Professor of Physics at the start of the 1999-2000 academic year, with a nine-month individual tenure track contract.

2. Keating received similar contracts for the following four academic years, including 2003/2004.
3. Each nine-month contract ran from August until May, the customary academic year at USD.
4. On June 9, 2004, Keaating was notified in writing by his supervisor that Keating was being considered for non-renewal of his tenure-track contract.
5. On June 22, 2004, Keating was afforded the opportunity to present to his supervisors (Professor Christina Keller) and the USD Vice President for Academic Affairs (Dr. Donald Dahlin) reasons why the action should not be taken.
6. At the June 22, 2004, hearing Keating with his supervisor and the Vice President, Keating verbally attacked and denigrated his supervisor rather than attempting to show why the non-renewal action should not be taken.
7. On June 29, 2004, USD President, James W. Abbott, notified Keating that the President was recommending to the Board of Regents that Keating's tenure track contract not be renewed for the 2004/2005 academic year.
8. Keating was offered and accepted a one-year term contract for the 2004/2005 academic

year.

9. Keating's contract for the 2003/2004 academic year was his fifth tenure track contract at USD.
10. Keating was advised in writing that the reason for President Abbott's recommendation included the "long-term tensions and hostilities" between Keating and the other members of his department, and Keating's lack of civility called for in Appendix G of the agreement between the South Dakota Board of Regents and the Council of Higher Education (COHE Agreement).
11. The procedures described in Findings 4 to 10 inclusive, are in accordance with the provisions of the COHE Agreement which govern Keating's contract of employment.
12. Keating filed series of thirteen grievances between June 25 and August 1, 2004, under the grievance procedures provided for in the COHE Agreeement.
13. All of Keating's grievances were denied at the local level. Keating appealed five to the South Dakota Board of Regents, which also denied each grievance as recommended by a hearing officer engaged by the board to consider the matter.
14. Keating also filed a petition with the Department of Labor alleging an unfair labor practicee, claiming Keating's non-renewal was retaliation for his having filed a grievance during the 2003/2004 year against his supervisor, Dr. Christina Keller, and that his non-renewal violated his free speech rights.

15. Keating's grievances against Dr. Keller was investigated and denied. Keating did not appeal the decision.
16. Keating is not a credible witness.
17. Keating was using the greivances he filed in the proceedings before the Department of Labo to punish the people involved.
18. Keating called his supervisor a "lieing (sic) backstabbing sneak".
19. Keating presented no evidence nor any witnesses to support his numerous claims and allegations.
20. Non-renewal of a tenure track contract is discretionary, and is not a disciplinary action by the express language of Section 8.6 of the COHE Agreement.
21. A grievance concerning non-renewal is limited to determining whether the decision was a result of failure to follow procedures.
22. USD followed applicable procedures in deciding not to renew Keating's tenure track contract.
23. The June 9, 2004, notification to Keating was late, because according to Section 8.6.3 of the COHE Agreement, notice should have been given by April 1. There is no penalty for late notice.
24. Keating made threatening and derogatory remarks to and was rude to both his department chair, Dr. Timothy Heaton, and his supervisor, Dr. Keller.
25. Keaating's remarks were personal attacks of a private nature were not concerned with matters of public interest.

26. While proceedings before the Board of Regents and the Department of Labor were pending or under consideration, Keating commenced three civil actions in the circuit court, Clay County, South Dakota: one against USD; one against his supervisor and department chair; one against the Governor, Board of Regents, President Abbot and other USD officials. Keating also commenced an action in the U.S. District Court against those respondents, Governor Rounds and other defendents. All of these judicial proceedings arose from the non-renewal of Keating's contract, were officially noticed in this proceeding, and all have been decided adversely to Keating.
27. Keating has the burden of proof regarding the grievances and the unfair labor practice.
28. Keating presented no evidence to support his claims in either instance.
29. Keating was disruptive of the Physics Department where he worked, was disrespectful to his supervisors, was uncoorperative, refused instruction, guidance or assistance when offered, and wrongfully used grievance procedures and civil trial proceedings as a means of punishing his supervisors and the administration at USD.
30. Keaating is a trouble maker and blames others for the results of his own bad conduct.

CONCLUSIONS OF LAW

A. USD properly applied the provisions of the COHE Agreement regarding non-renewal of contracts in deciding not to renew Keating's tenure track contract.

B. None of Keating's contract rights were violated.

C. USD did not retaliate against Keating for exercising his grievance rights.

D. Keating's right to free speech was not infringed.

E. Keating failed totally to carry his burden of proof regarding the grievances, his claim of retaliation or his claim of infringement on his free speech rights.

F. The decision of the Board of Regents denying Keating's grievance appeals should be affirmed.

G. The allegations of unfair labor practices filed with the Department of Labor should be dismissed.

H. To the extent that any of the foregoing Findings of Fact are deemed Conclusions of Law or any of the foregoing Conclusions of Law are deemed Findings of Fact, they shall be reconstituted accordingly.

I. An order will issue.

Dated this 6th day of November, 2006

SOUTH DAKOTA DEPARTMENT OF LABOR

By: Randy S. Bingner
Administrative Law Judge

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08-1217 (2)

Supreme Court, U.S.
FILED
JUN 18 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

CHRISTOPHER F. KEATING, PETITIONER

v.

JAMES W. ABBOTT, in his personal and professional capacities, AND THE UNIVERSITY OF SOUTH DAKOTA

MOTION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

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MOTION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests a rehearing on his petition for a writ of certiorari to review the judgment of the South Dakota Supreme Court in this case.

STATEMENT

Petitioner requests the Court to rehear his petition for a writ of certiorari dated March 3, 2009 in the above referenced proceeding.

Petitioner was dismissed from his tenure-track faculty position at the University of South Dakota in June 2004. The university claimed he violated a portion of the collective bargaining agreement between the South Dakota Board of Regents and the university faculty, as represented by the Committee on Higher Education, (the COHE agreement). Petitioner was informed the charge against him was that he violated the 'civility clause' of appendix G of the COHE agreement. Specifically, he made a comment concerning his supervisor in a private email that he sent from his private residence on a Saturday morning during his off hours. It has been uncontested at all times that this was a private email and was not made in the workplace. The university determined

that this comment was uncivil and dismissed Petitioner as a result.

The Circuit Court stated,

> "On June 9, 2004, Keating was given notice in writing by the Director of Physics and by the Vice President of Academic Affairs that USD was considering not renewing his tenure track contract for lack of adherence to the standards of civility required by his contract. On June 29, 2004, President James Abbott notified Keating of his decision not to recommend renewal of his tenure tract contract for the 2004-2005 academic year. President Abbott state that the decision was based upon Keating's failure to adhere to the standards of civility required by his contract." (Appendix, page A-6, first paragraph above grievance 1.)

Defendants never appealed this decision by the court or asked it to reconsider, so it is uncontested that Petitioner was dismissed for the single charge that he violated the civility clause of the COHE Agreement.

Petitioner argues the civility clause is unconstitutional because it is a violation of free speech rights as follows:

- It is a requirement for government employees to sacrifice their freedom of speech in order to obtain employment. This is in violation of consistent decisions on the part of the U.S. Supreme Court.
- It is in violation of decisions by the U.S. Supreme Court which state the government may not pick and choose which speech it will allow.
- Several similar university speech codes have been struck down in recent years by the courts as violations of free speech. No university speech code has ever been found to be constitutional. Some of the prior court decisions include:
    - *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989)
    - *Corry v. Stanford*, Superior Court, Santa Clara County, #740309, 1995
    - *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996)

- *UWM Post v. Board of Regents of University of Wisconsin*, 774 F. Supp. 1163 (E.D., Wis. 1991)
- *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993)
- *DeJohn v. Temple University*, 537 F.3d 301 (3d. Cir. 2008)

Petitioner argues that the civility clause is unconstitutional because it is vague. Specific instances of vagueness include:

- There is no definition of what constitutes incivility.
- There is no measure of incivility.
- There is no procedure for determining what is, or is not, uncivil.
- There is no instruction on who has authority to determine what is, or isn't, uncivil.
- There is no requirement for uniformity of action.

Petitioner argues the civility clause is unconstitutional on the grounds it is overbroad. Specific instances of overbroad include:

- It is not narrow or precise, giving the administration unlimited authority to restrict and constrain the speech of faculty members.
- It allows the administration to control the speech of faculty members far beyond the confines of employment, even to the point they may control private speech made by a faculty member in their own home and on their own time.
- There is no appeal possible due to the fact that only the administration is allowed to determine what constitutes uncivil speech.

Petitioner originally provided a detailed briefing on the constitutional issues surrounding the civility clause at his administrative hearing in January 2006. This briefing established a prima facie case that the civility clause was

unconstitutional. Defendants had two law firms working for them, neither of which rebutted Petitioner's argument. This briefing was also provided to the South Dakota Attorney General's office in accordance with regulatory requirements to allow the state to rebut the argument. The South Dakota Attorney General's office never made any rebuttal or comment concerning Petitioner's argument.

The South Dakota administrative law judge presiding at Petitioner's administrative hearing was provided this briefing and additional evidence submitted as part of Petitioner's written closing argument. By summary rules, Petitioner should have received a favorable decision due to the establishment of a prima facie case and a failure by the Defendants to rebut that case. Instead, the administrative law judge did not rule on the issue.

Petitioner provided the South Dakota Circuit Court judge all of Petitioner's arguments when he appealed the results of the administrative hearing. Petitioner followed this

with oral arguments at a July 2007 hearing, establishing a prima facie case that the civility clause is unconstitutional. Defendants did not rebut Petitioner's case. By the rules of summary judgment, Petitioner was entitled to a favorable decision by the South Dakota Circuit Court. However, the judge's findings did not address the issue of the civility clause's constitutionality.

Petitioner presented all evidence to the South Dakota Supreme Court and Defendants again failed to rebut Petitioner's legal argument. The South Dakota Supreme Court dismissed Petitioner's appeal and did not make any ruling on the question.

CONCLUSION

This is not a case of Petitioner being disruptive in the workplace. Petitioner was never, at any time, accused of, counseled for, or disciplined for being disruptive in the workplace. Petitioner was never charged with being

disruptive and was never provided any opportunity to defend himself against any such charges. Defendants have never introduced evidence to show Petitioner was disruptive in the workplace. The submitted evidence shows Petitioner received annual Faculty Performance Reports with grades of 'Exceeds Expectations.' The evidence also shows Petitioner was recommended for early promotion and received meritorious pay raises.

The constitutionality of the civility clause is what is being questioned. That is an issue that stands on its own merits and no action, or lack of action, on the part of Petitioner can alter the answer to that question.

By failing to rule on the question of the civility clause's constitutionality, the South Dakota courts gave the University of South Dakota and, by extension, all other universities in South Dakota, the authority to regulate the speech of all faculty members indiscriminately. As it now stands, the COHE agreement and the actions of the courts

give the university administration absolute control over the speech of all faculty members. They now have the authority to rule any speech as being uncivil, no matter what is said, where it is said, or when it is said. They may rule that one faculty member is civil, while another faculty member is uncivil for saying the exact same thing as the first. They may control what faculty members say in private communications, what they say on their own time, and even what they say in the privacy of their own homes. The faculty is aware of this capriciousness, but is powerless to do anything about it except to engage in lengthy and expensive court fights.

This situation will continue to exist until such a time as it is overturned in the courts. Meanwhile, other universities will continue to try to enforce speech codes, resulting in even more cases before the courts.

For all of these reasons, Petitioner requests the Court reconsider its decision on his Petition for a Writ of Certiorari

so that this issue may be heard before the Court and one, all-encompassing decision can be made.

Respectfully submitted.

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APPENDIX
First Judicial Circuit Court

November 30, 2007

Christopher Keating
167 Bank Stree #3
New London, CT 06320

Robert B. Frieberg
Attorney at Law
P.O. Box 511
Beresord, SD 57004

Re: Keating v. James W. Abbott et. al. Civ. 06-307

Dear Mr. Keating and Mr. Freiberg:

This matter came before the court on appeal from an administrative decision by the Department of Labor and Management ("DOL") denying several grievances and unfair labor practices filed by Christopher Keating ("Keating") arising from his employment at the University of South Dakota. Both parties submitted writeen and oral argument in support of their respective positions. The administrative record consists of hundreds of pages of documents, which the court has now had an opportunity to review; however, there is no transcript of the proceedings and testimony before the DOL. Keating has also made an application to present additional testimony in support of his claims, which the Appellees, James Abbott and the University of South Dakota (hereinafter jointly referred to as "USD") resist.

Failure to Order a Transcript of the Administrative Proceedings

SDCL 1-26-32.2 requires the appellant to order a transcript, or such part of the administrative proceedings he deems necessary for the appeal within ten days after filing the appeal. Keating failed to order any part of the administrative transcript. The court understands that there was a two day hearing before the DOL with testimony from several witnesses, along with one or more prehearing conferences. Keating asserts that the DOL made numerous errors arising from the proceedings from which there are no record. Keating's failure to timely order the transcript under the statute constitutes a waiver of the right to order the transcript and makes the review of several issues presented difficult.

SDCL 1-26-32.2 sets out a timeframe frame for each party to order any portion the transcript. However, the obligation the appellee to order a transcript is only triggered if appellee deems other portions of the transcript are necessary based upon the statement of issues filed or based upon portions of the transcript ordered by appellant. USD has not requested this court to review any issues that were before the DOL.

The rules for ordering a transcript in an administrative appeal are similar to the rules for appeals to the Supreme Court in SDCL 15-26A-48, 15-26A-49, and 15-26A-50. Under its appellate rules the Supreme Court has held that appellant bears the primary responsibility to present a complete record to the reviewing court. In Baltodano v. North Central Health Services, Inc., 508 NW2d 892, 894 (SD 1993), the Court stated:

"We have stated that "the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant." Pearson v. Adams, 279 N.W.2d 674, 676 (S.D.1979). "Failure to timely order a transcript constitutes a waiver of the right to a transcript." SDCL 15-26A-49; Reed v. Heath, 383 N.W.2d 873, 874 (S.D.1986). Where an

appellant waives the right to a transcript by failing to order it, the only review which can take place 'is a review of that portion of the record which was before the circuit court.' Hawkins v. Peterson, 474 N.W.2d 90, 92-93 (S.D.1991). Where the record contains no transcript, the record on appeal is confined to those pleadings and papers transmitted from the circuit court. Reed, 383 N.W.2d at 874 (citing Pearson, 279 N.W.2d at 676; Caneva v. Miners & Merchants Bank, 335 N.W.2d 339, 342 (S.D1983))."

The court will review this appeal based upon the record submitted for the DOL.

Application to Present Additional Evidence

Keating's Application to Present Additional Evidence asserts that he should be permitted to subpoena additional documents not received prior to the administrative hearing. He seeks production of a number of documents that he claims support his issues on appeal. The documents sought consist of emails between various USD employees. In addition, Keating also seeks the notes of Roberta Hakl, a USD employee, who was involved in the investigation of Keating's claims harassment and retaliation by USD.

The record shows that Keating subpoenaed several witnesses, including Hakl on more than one occasion. It is unclear whether the subpoenas were honored, or if an issue was ever addressed by the DOL concerning compliance. Subsequently, Keating served Requests of Production of documents upon USD. The requests included email from USD employee and documents in Hakl's possession. USD responded by stating that ll the requested documents would be made available for inspection and copying, except for Keating's request to inspect documents showing attorney's fees paid by USD to its attorney. Keating moved to compel

production of the attorney's fees, which the DOL denied prior to hearing. Keating does not challenge this ruling.

There is no showing that Keating ever moved o compel the attendance of any witnesses or the production of any documents before the DOL. Further, there is no showing that Keating asserted to the DOL that USD failed to make any of the requested documents available, or that documents were missing. Keting makes several references to discussions during the proceedings before the DOL involving documents or witnesses at issue. The transcript was not ordered and the court is unable to locate documents in the record which support Keating's claims.

SDCL 1-26-34 provides that he circuit court may order additional evidence to e presented to the agency from which an appeal is made upon a showing that the additional evidence is material and that there were good reasons for the failure to present the evidence in the proceedings before the agency. Initially, the court is unable to determine from the record how any of evidence would be material or whether it is cumulative to the evidence presented at the DOL hearing. Moreover, Keating has failed to show that there are good reasons for the failure to either discover or present this evidence before the DOL. For these reasons, the Application to present additional evidence is denied.

Standard of Review

The court reviews the administrative decision as set forth in SDCL 1-26-36. The court accords great weight to the findings and inferences made by the hearing examiner on factual questions. Clarkson & Co. v. Harding County, 1998 SD 74, ¶5, 581 NW2d 499, 501. When the issue is a question of fact, the Court reviews the administrative agency's findings under a clearly erroneous standard. Petersen v. Hinky Dinky, 515 NW2d 226, 231 (SD 1994). Questions of law are fully reviewable de novo and no deference is to be

given to the administrative agency's conclusions. Thomas v. Custer State Hospital, 511 NW2d 576 (SD 1994); Petersen v. Hinky Dinky, 515 NW2d 226 (SD 1994); Johnson v. Skelly Oil Co, 359 NW2d 130 (SD 1984). It is within the province of the court to interpret statutes without assistance from the agency. Permann, supra.

Issues on Appeal

Keating filed five grievances against USD arising from the non-renewal of his tenure track contract with USD. Each grievance was filed pursuant to the Counsel of Higher Education Agreement (COHE)[1], which is the collective bargaining agreement governing Keating's employment with USD. Each grievance was denied in the final stage of the grievance process before the South Dakota Board of Regents. The DOL also denied each of the grievances on appeal to the agency. Keating claims that the DOL erred in this determination and also asserts that the DOL erred in denying his two unfair labor practices claims against USD. Finally, Keating also asserts that the DOL's decision was made upon unlawful procedure because the administrative law judge engaged in "judicial bias" toward him. This claim was not raised by Keating before the DOL.

[1]The COHE agreement in force as the time of the nonrenewal was for the period of 2002 to 2005. Although a new COHE agreement in currently in effect, the court refers to the COHE agreement in a present tense because the provisions at issue are unchanged in the subsequent agreement.

Keating was employed as a tenure track Associate Professor of physics at USD beginning in the 1999-2000 academic year. Before each academic year, Keating signed a one year written contract with USD providing that this employment would terminate at the end of each academic year, subject to the right to renew the contract at the sole

discretion of USD. Keating signed a one year contract each year through the 2003-2004 academic year.

On June 9, 2004, Keating was given notice in writing by the Director of Physics and by the Vice President of Academic Affairs that USD was considering not renewing his tenure track contract for lack of adherence to the standards of civility required by his contract. On June 29, 2004, President James Abbott notified Keating of his decision not to recommend renewal of his tenure tract contract for the 2004-2005 academic year. President Abbott state that the decision was based upon Keating's failure to adhere to the standards of civility required by his contract. President Abbott extended Keating an offer of a one year term contract for the following academic year. Keating accepted this offer and taught for another year under the one year term contract.

Grievance 1: That the non-renewal of his tenure track contract with USD was disciplinary action and USD failed to follow Sections 8.6 and 15 of the COHE agreement in taking this action.

Keating argues that because USD cited a reason for the non-renewal of his tenure track agreement that the action was disciplinary in nature and required USD to follow Section 15 of the COHE Agreement addressing "discipline" and "just cause" termination of an employee. Keating argues that Section 8.6 relied upon by USD for non-renewal of his contract was not proper because USD terminated his contract for cause.

The DOL found and Keating does not dispute he was employed by USD under the terms of a nine month tenure track contract as a physics professor for the 2003/2004 academic year. The DOL also found that Keating's contract with USD was not renewed based upon the June 29, 2004

decision of President Abbott. These facts are supported by the record before the court.

The court has reviewed the DOL's written decision and legal conclusions based upon these facts. The DOL decision properly reads the provisions of the COHE contract relating to non-renewal of a tenure track contract. The CHOE agreement is clear that "None-renewal is not a disciplinary action." Further the COHE agreement specifically state that the "notice will state the reasons for the decision" not to renew. The uncontested facts and plain terms of the COHE agreement show that the action taken by USD was a non-renewal of Keating's contract. Keating does not cite any authority, nor is there any language in the COHE Agreement supporting his claims. The court adopts and affirms the findings of fact and conclusions of law entered by the DOL on this issue.

Grievance 2: That the non-renewal of Keating's contract with USD was in retaliation for his participation in a grievance claim made against his supervisor, Christina Keller ("Keller") in the fall of 2003;

Keating claims that the DOL erred in determining that the non-renewal of his contract was not in retaliation for the grievance which he filed against Keller. The written documents in the record show that Keating filed his grievance against his supervisor in September 2003 alleging harassment and retaliation. On May 6, 2004 Hakl found no violations by Keller. The non-renewal of Keating's contract was initiated in June of 2004. Citing Leslie v. Hy-Vee Foods, Inc., 2004 SD 59, para 11, 679 NW2d 785 the DOL determined that the filing of the grievance against his supervisor was a protected activity and that Keating suffered an adverse employment action subsequent to his filing the grievance. However, the DOL found that Keating failed to show a causal connection between the protected activity and

the adverse employment action, a necessary third element to establish a prima facie case of retaliation. Despite the determination that Keating failed to show a prima facie case of retaliation, the DOL went on to find that USD had a legitimate non-discriminatory reason for the non-renewal.

Leslie does not discuss the quantum of proof necessary for a claimant to initially establish a prima facie case of discrimination or retaliation. The Eighth Circuit, which uses the same burden shifting analysis as Leslie for a claim of retaliation has discussed the quantum of proof for a prima facie case on a number of occasions. In Stewart v. Independent School District No. 196, 481 F3d 1034, 1043 (8th Cir. 2007), the court stated:

We have described the actual evidentiary burden that a plaintiff must meet at the prima facie stage as "minimal." Logan, 416 F.3d at 881. Where the evidence is not strong, that evidence, standing alone, may be insufficient to sustain the plaintiff's case at the final stage of the burden-shifting analysis. See id at 881...

Taken together, these cases demonstrate that the burden-shifting framework is merely an analytical construct: the ultimate burden of proving retaliation remains at all times with the plaintiff; and the level of proof required to show causation is less at the prima facie stage than at the final stage of the McDonnell Douglas analysis. As such, if an employer has articulated a legitimate reason for its actions, it is permissible for courts to presume the existence of a prima facie case and move directly to the issue of pretext and the determination issue of causation when bypassing the prima facie case analysis leads to clarity in framing the issues under review.

The DOL found "Keating did not produce any evidence or a single witness in support of his version of the

facts." The DOL also found Keating's testimony was not credible. The DOL also made findings concerning USD's stated reason for non-renewal:

"the evidence does provide the support for USD's decision. The evidence proves that Keating did not adhere to the civility standards set forth in Appendix G to the COHE Agreement. All of Keating's own witnesses affirmed the facts that he was uncivil, uncooperative, unreasonable in his demands, and disruptive during his employment. Further, these witnesses established that he was unwilling to accept any suggestions from others to improve his behavior."

Keating has failed to submit anything to show these findings are in error and the written documentation in the record supports the DOL's findings. The findings are not clearly erroneous. Even applying the presumption that a prima facie case of retaliation existed, Keataing has failed to meet his ultimate burden to show retaliation on this record as USD had a legitimate non-discriminatory reason for the non-renewal. The court adopts and affirms the findings of fact and conclusions of law by the DOL, except that the court clarifies its conclusion that even under a presumption that a prima facie case of retaliation occurred, Keating has failed to meet his burden of show retaliation because USD had a legitimate nondiscriminatory reason for the non-renewal.

Grievance 3: That Keating's years of service were improperly calculated and as a result USD failed to follow the proper procedure for the non-renewal of his contract, and that if the years of service were properly calculated, USD had no authority to non-renew Keating contract under COHE.

Keating alleges that that he had less than four years of service at the time his contract was not renewed and was entitled by notice of his non-renewal by December 15 under

Section 8.6(2). The DOL determined that Keating had more than four years of service and was entitled to notice by April 1 under Section 8.6(3), which although untimely, Keating was not entitled to any additional remedy for the late notice. There is no dispute that USD's notice of non-renewal of Keating's contract was late because the Keating was not given notice until June of 2004.

Despite the belated notice, the DOL determined that Keating was given a one year term contract following the notice of non-renewal consistent with Section 8.6(3) and because the COHE agreement did not provide any other remedy or penalty for late notice under Section 8.6(3), the late notice did prejudice Keating. Keating argues that because of two leaves of absence of military service during his time at USD he had less than four years of service and that he was prejudiced by the late nonrenwal notice.

The first question is whether Keating was entitled to notice of nonrenewal under Section 8.6(2) (2-4 years of service) or under Section 8.6(3) (more than four years of service). The DOL determined that Keating received five tenure track contracts before he was non-renewed in June 2004 and thus had more than four years of completed service at the time of nonrenewal. The DOL found that Keating had two separate military leaves while under contract with USD. The DOL found the first leave to be eight months and days during 2001/2002 and the second leave to be two months and one day in 2003. This totals to more than one academic year and would leave Keating with 3.86 years of service as of completing his fifth year in 2003/2004 as noted by the DOL.

Keating does not dispute the DOL's findings. The issue is whether the DOL properly applied these facts to the express terms of the COHE agreement. Section 21.4 provides that faculty members are eligible to request unpaid leave for required military service. The second paragraph of Section

13.2 provides that "[t]enure track service credit is not earned during a period of leave of absence..." This paragraph further states, "Full-time assignment to off campus duties in the service of private industry or government is treated as a leave of absence..." The subsections under Section 8.6 discussing timely notice of nonrenewal calculates the number of years based upon the "years of service under a tenure track contract". The COHE agreement is clear that number of years is not based upon the number of contracts signed, but rather based upon the actual time of service under the contracts. Deducting the two leaves of absence taken by Keating as required by the COHE agreement shows that Keating had less than 4 years of service as of the time he completed his fifth contract year. The DOL erred in determining that Keating had more than four years service based upon the clear terms of the COHE agreement.

Having determined that Keating had less than four years of service as defined by COHE, he was entitled to the notice under Section 8.6(2) requiring notice by December 15. The notice was not given to Keating until at least June 9. Section 8.6(4) provides the remedy for a late nonrenewal of an employee with less than four years of service as either a (1) payment for twice the number of working days the notice is late, or (2) a contract for such length of time. The notice to Keating was late by half of the academic year. Keating was offered and received a subsequent term contract for an entire academic year. Although the language of Section 8.6(4) bases the length of the contract upon the number of "working day' the notice was late, Keating has failed to show that the one year term contract he was offered was less than twice the number of working days the notice was late. Keaating has failed to meet his burden toi show that USD's violation of the procedural requirements of the COHE agreement resulted in any prejudice to him. See, Beville v. University of South Dakota, 420 NW2d 9, 14 (SD 1988).

Because Keating had less than four years of service, it is unnecessary to determine whether USD was required to offer Keating another tenure track employment contract for 2004/2005 b ecause of the untimely notice under Section 8.6(4) (more than four years of service). The court affirms the decision of the DOL under this section, but modifies the conclusions of law for the reasons set forth herein.

Grievance 4: That USD failed to fairly and adequately apply the COHE agreement, and I doing so should commence disciplinary actions against Keller.

The written decision of the DOL states that Keating's claim "that the COHE Agreement had been inequitably applied was denied for lack of evidence of any inequitable application of ny terms of the COHE Agreement." This decision is incorporated into the Findings of Fact and Conclusions of Law. It appears that the determination of this issue occurred during the hearing before the DOL for which the court does not have a transcript.

Keating fails to allege any specific error by the DOL in its determination of "lack of evidence of any inequitable application of the any terms of the COHE Agreement." The court does not find any error based upon its review of the record. The court affirm's the DOL's decision on this issue and adopts the DOL's Findings of Fact and Conclusions of Law on this issue.

Grievance 5: That Keating was discriminated against by USD because of his veteran status.

The written decision of the DOL states as to this grievance that "[d]uring the hearing before the Department, Keating's allegation that he had been denied veteran's preference was denied as untimely." Keating does not assert any specific error as to the DOL's determination on this

issue, nor has he presented any part of the record showing that this determination was in error.

The court also notes the DOL's decision on the claim of retaliation by Keating in which the DOL found that USD had a legitimate non-discriminatory reason for Keating's non-renewal. There is no finding, nor is there any evidence in the record before this court that Keating's veteran status had anything to do with his non-renewal. The court affirms the DOL on this issue and adopts the DOL's Findings of Fact and Conclusions of Law on this issue.

Unfair Labor Practice #1: That USD committed an unfair labor practice and violated his Constitutional Right of Free Speech under the First Amendment by invoking the "civility clause" of the COHE Agreement against Keating.

Keating asserts that USD committed an unfair labor practice under SDCL 3-18-3.1(1) by denying his free speech rights guaranteed by the First Amendment to the Constitution. If true, such a claim is the proper basis for an unfair labor practice under the statute, which prohibits a public employer from interfering with, restraining, or coercing "employees in the exercise of rights guaranteed by law." It is unclear from the record what "protected" statements Keating claims led to his non-renewal. The only specific statement Keating asserts in his brief and at oral argument was his email to the chairman of the department, Timothy Heaton, calling Keller a "liein (sic) backstabbing sneak".

In Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) the United States Supreme Court recognizes that a state cannot condition public employment on a basis that infringes upon an employee's constitutional free speech rights. Pick3ering and the cases following w:st="on"Pickering have developed a four step

analysis to determine whether an employee's right to free speech is violated.

Initially, the trial court must determine the threshold issue of whether the employee's speech is a matter of public concern. Rankin v. McPherson, 483 U.S. 378, 146 (1987); Connick v. Myers, 461 U.S. 138, 146 (1983). This involves an examination of the content, form, and context of the speech. Ranking, 483 U.S. At 384-85. The court must then weigh the interests of the public employee against the interest of the public employer, again considering the context and circumstances of the speech. Ranking, 483 U.S. At 388. Both of these steps are questions of law for the trial court. Burnham v. U.S. At 388. Both of these steps are questions of law for the trial court. Burn v. Ianni, 119 F.3d 668, 679 (8th Cir. 1997); Kincade v. City of Blue Springs, 64 F.3d 389, 395 (8th Cir. 1995). Only after the court determines the first two issues does the fact-finder make a determination in the third step of whether the protected speech played a substantial role in the employment decision. Mt. Healthy City School Bd v. Doyle, 429 U.S. 274, 287 (1977). If so, the employer has the burden in the fourth step to prove that I would have reached the same decision in the absence of the protected speech. Id. At 287.

The email message containing the remark about Keller does not reflect any matter of public concern. Rather, the email only involves a discussion of employee relationship issues between Keating and others in the Department. As the Court in Connick, 461 U.S. At 147 stated such communications are not made "as a citizen upon matters of public concern, but instead as an employee upon matters of only a personal interest."

The DOL determined that "Keating's criticism of his supervisors did not rise to the level of speech protected by the First Amendment". This court does not find any error in this

determination. Keating has failed to present any testimony from the DOL hearing to show that any statements he made involved a matter of public concern. Further, Keating specifically acknowledged to this court at the time of the oral arguments that the email containing the derogatory comment about Keller was a private communication made from his home to the department chair. He argued that he did intend the email to be a public communication.

Because Keating failed to meet the first prong of Pickering his free speech claim must fail and there was no violation of SDCL 3-18-3.1(1). The court affirms the decision of the DOL on this issue for the reasons stated herein.

Unfair Labor Practice 2: That USD committed an unfair labor practice b dismissing him in retaliation for filing a grievance against Keller.

Keating's claim of an unfair labor practice for retaliation is the identical issue he raises in his second grievance. For the reasons set forth therein the court affirms the denial of the claim for retaliation and adopts the DOL's findings and conclusions, except as modified in the discussion above in Grievance 2.

Whether the Department enganed in "judicial bias" or other unlawful procedure in determining Keating's appeal.

Keating asserts that the administrative law judge was biased toward him in handling of the hearing and in the decision rendered. Keating makes several complaints about the administrative law judge's bias toward him during the hearing. The court does not have the transcript of the hearing supporting such claims and there is no showing that any such

claims were asserted by Keating at the time of the administrative hearing.

In Gilkyson v. Wheelchair Express, 579 NW2d 1 (SD 1998) the Court held that party waives a claim of judicial misconduct by failing to raise the issue at he time of trial. Gilkyson Court stated the rationale for this rule as follows:

The affidavits containing Wheelchair Express' version of the objectionable facts were filed well after the completion o the trial, thus denying the plaintiff the chance to be timely heard on the matter. In addition, it denied the trial court the opportunity to consider an objection and take whatever measures it felt were necessary, if any, to correct the situation. Id. At 4.

The court does not find any basis for a claim of judicial bias or misconduct by the administrative law judge during the hearing, but such claims were waived by failing to assert such a claim at the time of hearing.

Keating also argues judicial bias or misconduct in the written ruling from the Department. It appears that the bulk of Keating's complains about the administrative law judge simply reflect his disagreement with the ruling by the Department. This does not create a basis for asserting a claim of judicial bias or misconduct. The Court in State v. Page, 709 NW2d 739, 750 (SD 2006) stated, "As we have consistently stated, this Court presumes a judge was impartial absent a specific and substantial showing to the contrary." The Page Court further cited Canon 3E(1)(a) of the Code of Judicial Conduct occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

Keating disagreement or disappointment with the DOL's decision does not create a basis to assert judicial bias. The written decision, findings and conclusions of the Department do not demonstrate any judicial bias by the DOL toward Keating. The decision is well supported by the record before this court. The court finds absolutely no basis in this record to support Keating's claims of judicial bias or misconduct.

For all the reasons set forth herein the court affirms the decision of the Department. The court requests Mr. Frieberg to prepare findings of fact, conclusions of law and a judgment consistent with this ruling.

Sincerely your,
Steven R. Jensen
Circuit Court Judge

ORDERED that the Application to Present Additional Evidence is denied.

Dated this 2nd day of January, 2008

BY THE COURT:
Steven R. Jensen, Judge
Circuit Court